APPENDIX A — ORDER DENYING PLAINTIFFS' MOTION TO STRIKE AND GRANTING DEFENDANTS' "MOTION FOR SUMMARY JUDGMENT" OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED SEPTEMBER 30, 2002

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 98-CV-74473-DT

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Plaintiffs,

v.

LT. COL. JOHN SIMONINI, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE AND GRANTING DEFENDANTS' "MOTION FOR SUMMARY JUDGMENT"

Pending before the court is Defendant's "Motion for Summary Judgment"[1] filed on December 10, 2001.

1. Although the motion is styled as one for "summary judgment," Defendants specifically seek a "dismissal" of the claims. Ordinarily, when a motion brought under Rule 56 is granted, a (Cont'd)

Plaintiff[2] responded on January 3, 2002 and Defendants replied on January 18. Voluminous information has been filed under seal both in support and in opposition to the motion, and two sealed briefs in support of Defendants' motion have been filed as well. Also pending before the court is Plaintiffs' motion to strike, filed on January 3, 2002, in which Plaintiffs seek to strike all references to David

Tenenbaum's polygraph test from Defendants' briefs. For the reasons stated below, the court will deny Plaintiffs' motion and grant Defendants' motion.

I. BACKGROUND

The following facts are not contested for purposes of this motion.[3] Plaintiff, an engineer and employee of the

(Cont'd)
judgment rather than a "dismissal" is entered. See F. R. Civ. P. 56(c) (". . . the *judgment* sought shall be rendered. . . .") (emphasis supplied). However, where a motion to dismiss is brought under Rule 12(b)(6) and the court is presented with matters outside. the pleading, the motion is reviewed "as provided in Rule 56. . . ." F. R. Civ. P. 12(b). Further, application of the state secrets doctrine may result in a dismissal of the entire action. See *United States v. Roberts*, 345 U.S. 1 (1953).

2. There are two plaintiffs, but Madeline Gail Tenebaum's claim is derivative of her husband's; thus, "Plaintiff," as used herein, refers to David Aaron Tenenbaum.

3. A "statement of material facts" was presented by Defendants and not contradicted by Plaintiff, although additional material facts
(Cont'd)

Appendix A

United States Army Automotive Armaments Command ("TACOM"), initiated the instant action, claiming disparate treatment because of Jewish religion. He came under suspicion with respect to his relationship with engineers and other representatives of the Israeli armed forces, especially the Israeli Liaison Officer to TACOM. Defendant Simonini considered Plaintiff a potential security risk. When Plaintiff requested a higher security classification, he was subjected to more intense scrutiny than was normally the case, including a polygraph examination. In the course of the examination, according to the examiner, Plaintiff made certain incriminating verbal statements relating to providing classified information to unauthorized persons. Plaintiff says that he never made such statements, and that the report of them is part of the discriminatory, conspiratorial vendetta against him.[4] In any event, it is clear that Defendants became more highly concerned after hearing the report of the examiner, and stepped up the investigation into Plaintiff's activities. A federal search warrant was sought and obtained,

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(Cont'd)
were proffered in Plaintiffs' response to the motion. The court's scheduling order requires that the "Statement of Material Facts" included as part of the moving party's brief is to be directly responded to: "the response should contain corresponding numbered paragraphs that admit, or provide alternative facts to that proffered in the motion."

4. Because the court finds that Defendants cited Plaintiff's polygraph results for a limited purpose and not to either attack Plaintiff's credibility or establish the correctness of the results of that examination, the court will deny Plaintiff's motion to strike. *See, generally, United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (holding that it is within the discretion of the trial judge to admit polygraph results) .

and Plaintiff's home was searched. Plaintiff was placed on paid leave for over a year, and ultimately no criminal charges were brought against him.

Defendants bring this motion to dismiss relying on the state secrets doctrine, claiming that state secrets form the basis of a defense to the claims, and that because, by the operation of the privilege, they are prohibited from coming forward with the information, they are deprived of a defense and that this suit must accordingly be dismissed. Alternatively, Defendants move for summary judgment on all claims.[5] Plaintiff opposes the motion.

II. Standard

The state secrets doctrine is based upon the states secret privilege, which protects against disclosure of information that may adversely affect national security interests. This privilege "head[s] the list" of evidentiary privileges. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978). The Executive Branch may invoke the privilege where the disclosure of state secrets could harm the nation's defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments. *See Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983).

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5. Because the court finds that dismissal is appropriate under the state secrets doctrine, the court will not address Defendants' alternative request for summary judgment on the individual counts pursuant to Federal Rule of Civil Procedure 56. The court notes, however, that even if the state secrets doctrine did not apply, summary judgment appears to be appropriate on at least some of the Plaintiffs' claims.

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The government is given broad latitude with respect to the circumstances in which it may invoke the privilege. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991). Indeed, the government may invoke the privilege to protect even unclassified information. *Maxwell v. First Nat'l Bank of Maryland*, 143 F.R.D. 590, 596 n.6 (D. Md. 1992), *aff'd*, 998 F.2d 1009 (4th Cir. 1993). Additionally, courts will uphold a claim of privilege for information that may seem harmless standing alone, but that, when added to other information, poses a reasonable danger of divulging too much to a "sophisticated intelligence analysis." *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) (citing *Halkin*, 598 F.2d at 10). Accordingly, in reviewing the assertion of the state secrets privilege, a court's standard of review "is a narrow one. Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin*, 598 F.2d at 9 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). As stated by the Supreme Court,

> [t]he decisions of the Director [of Central Intelligence], who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency. . . . And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure

> of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

Cent. Intelligence Agency v. Sims, 471 U.S. 159, 179-80 (1985).

Where the very subject matter of an action is a state secret, dismissal of the entire complaint is warranted. *See United States v. Roberts*, 345 U.S. 1, 11 n.26 (1953) (citing *Totten v. United States*, 92 U.S. 105 (1875) as an example of such a dismissal); *see also Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) ("Not only does the state secrets privilege bar Frost from establishing her *prima facie* case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security. . . . Therefore, as the very subject matter of Frost's action is a state secret, we agree with the district court that her action must be dismissed."); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (finding dismissal appropriate, where the "information covered by the privilege is at the core of [the plaintiff's] claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.").

III. Discussion

The parties do not dispute that the "state secrets privilege" is well-recognized as "a common-law evidentiary rule that allows government to withhold information from discovery when disclosure would be inimical to national security," *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d

544 (2d Cir. 1991), but disagree on its application here. Plaintiff focuses on his factual allegations of discriminatory investigation, while functionally ignoring Defendants' argument that a valid defense to Plaintiff's claims would require the use of information unavailable to them because of the privilege.

The parties have known for more than a year of the applicability of state secrets in this case, as the court entered an "Order Denying Plaintiff's Motion to Compel" since on August 29, 2001, finding that the government had proven the applicability of the state secrets doctrine. (*See* 8/29/01 Order). Having now extensively reviewed all materials submitted in relation to the instant motion, the court finds that, first, a resort to unavailable state secrets would be required in order for Defendants to defend, thus exercising the state secrets privilege precludes the Defendants from presenting a defense, and that, second, the state secrets doctrine accordingly requires dismissal of the suit.

The documents at issue in this case were gathered by, or are in the possession of, the Federal Bureau of Investigation ("FBI") and the Department of Defense. The court has reviewed the materials filed under seal and is satisfied that the declaration of the Attorney General, made after personal consideration, establishes that revealing the information at issue "would create a reasonable risk of harming the nation's defense capabilities, disclosing intelligence gathering methods or capabilities, or disrupting diplomatic relations with foreign governments." (Ashcroft Dec. ¶¶ 2-3, labeled as Defs.' Ex. 17.) Further, the court also accepts the statement of United States Deputy Secretary of Defense Paul Wolfowitz

that "disclosure of the information in question could reasonably be expected to cause serious damage to the national security," (Wolfowitz Dec. ¶¶ 4, 7, labeled as Defs.' Ex. 18). Finally, after reviewing the numerous classified declarations and documents which were filed under seal, the court is firmly convinced that the state secrets doctrine applies in this case and makes dismissal necessary.

The court is hesitant to delve too deeply into the assertions of privilege and the facts which make the privilege applicable. "Care in protecting state secrets is necessary not only during a court's review of the evidence, but in its subsequent treatment of the question in any holding; a properly phrased opinion should not strip the veil from state secrets even if ambiguity results in a loss of focus and clarity." *Black v. United* States, 62 F.3d 1115, 1119 (8th Cir. 1995). Nonetheless, the court will provide a general explanation of why this suit must be dismissed, without threatening disclosure of the very secrets which must be protected. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953) ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.").

Plaintiff asserts numerous causes of action against Defendants. Nonetheless, the parties and the court agree that

> the core issue of this case involves Defendants' invidious discrimination against Tenenbaum which culminated in Snyder's interview of Tenenbaum from which Snyder attributed false

> confessions to Tenenbaum to finally justify an FBI criminal investigation which began with a search and seizure at Plaintiff's residence on the Sabbath, despite the fact that there was no probable cause for this search.

Pls.' Resp. Br. at 27.) In order to defend against these allegations Defendants would have to jeopardize state security. Specifically, Defendants allege that they "cannot explain or disclose the actual reasons or motivations for their actions without revealing state secrets." (Defs.' Rep. Br. at 3.) Further, Defendants assert that "they are precluded from adequately describing and explaining the true nature and purpose of their actions without disclosing state secret information." (*Id.* at 4.) Having reviewed the sealed materials, the court agrees.

As for the particular counts, the court first notes that the allegation of religious discrimination is woven throughout Plaintiff's entire Second Amended Complaint. Thus, if the court were to allow any claim to proceed, the court finds that Defendants could not adequately defend against Plaintiff's assertions, because such defense would entail disclosure of facts which would create a reasonable, if not certain, danger to national security. This alone justifies dismissal of Plaintiff's entire action. More specifically, in order to defend against the allegations of unlawful conspiracy, Defendants would have to reveal their actual reasons and motivations for taking the actions that they did. Accordingly all the conspiracy counts must be dismissed, because the state secrets doctrine prevents Defendants from presenting a valid

defense. (2nd Amend. Compl., Counts I & IV.)[6] Further, the counts which assert an unreasonable search and seizure and various allegations of violations of state law (slander and libel, false arrest and imprisonment, unreasonable search and seizure, unlawful detention, assault and battery, and grossly negligent acts) must also be dismissed as, in order to defend against these allegations, Defendants would have to reveal state secrets with respect to the propriety of their actions and statements, and the manner in which any investigation was conducted. *(Id.*, Counts II, V, VI, VII, VIII & X.) The Federal Tort Claims Act asserted against the United States involves the same questions as those asserted against the underlying Defendants and thus must also be dismissed. *(Id.*, Count IX.) Finally, the court also notes that whether the individual Defendants would be entitled to qualified immunity, which is of course central to their defense, also implicates issues of national security. Specifically, inquiry into the scope of their authority and the lawfulness and propriety of their actions are issues which simply cannot be adequately addressed without endangering state secrets. Finally, the consortium claim is wholly derivative of the principal claims of the husband and principal plaintiff, and cannot succeed if the principal claims fail. *Oldani v. Leiberman*, 375 N.W.2d 778, 779-80 (Mich. Ct. App. 1985). Because the court will dismiss the principal plaintiff's claims in this case, the consortium claim will also be dismissed. (2nd Amend. Compl., Count XI.)

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6. Count III was previously dismissed in an "Opinion and Order Granting in Part, and Denying in Part, Defendants' Motion to Dismiss," entered by Judge Victoria A. Roberts on April 29, 1999 [Dkt. # 18]. The court notes that the state secrets doctrine, however, would also compel dismissal of Count III.

Accordingly, the court finds that this case must be dismissed, "due to the centrality of the privileged material to the very question upon which a decision must be rendered." *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985); *see also Totten v. United States*, 92 U.S. 105, 107 (1875) ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.") .

IV. Conclusion

For the reasons stated above, IT IS ORDERED that Defendants' motion for summary judgment [Dkt. # 93] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' "Motion to Strike all References and Exhibits with Respect to Polygraph Examination Results . . ." [Dkt. # 99.] is DENIED.

IT IS FURTHER ORDERED that this action is DISMISSED WITH PREJUDICE.

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: September 30, 2002

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 19, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-2297

DAVID AARON TENENBAUM;
MADELINE GAIL TENENBAUM,

Plaintiffs-Appellants,

v.

JOHN SIMONINI, Lt. Col.; ALBERT D. SNYDER; MARK P. YOURCHOCK; ROBERT M. RILEY, Individually and in their Representative Capacities as Employees for the Various Federal Agencies that Employ Them; and the UNITED STATES OF AMERICA,

Defendants-Appellees.

Before: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

COOK, Circuit Judge. Plaintiffs-Appellants David Tenenbaum and his wife sued various federal agency employees and the United States, alleging that Defendants conducted a criminal espionage investigation of Tenenbaum solely because he is Jewish. The district court granted Defendants' summary judgment motion, accepting their argument that they could not defend themselves against

Appendix B

Tenenbaum's claims without disclosing information protected by the state secrets doctrine. The Tenenbaums challenge the summary judgment ruling, contending that (1) disclosure of the privileged material is not critical to defending against their religious discrimination case, and (2) the district court should have allowed the case to proceed by employing evidentiary controls to protect the privileged material. We affirm.

We review the district court's grant of summary judgment de novo, *Stephenson v. Allstate Ins. Co.*, 328 F.3d 822, 826 (6th Cir. 2003), while according the government's assertion of the state secrets doctrine considerable deference, *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

Having reviewed the materials Defendants produced under seal, we agree with the district court that the state secrets doctrine applies because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments. *Ellsberg*, 709 F.2d at 56-57; *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (holding that courts may accept the government's assertion of the state secrets privilege if they are satisfied that there is a "reasonable danger" that disclosing the evidence will expose information that "in the interest of national security, should not be divulged.").

We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus

deprives Defendants of a valid defense to the Tenenbaums' claims, we find that the district court properly dismissed the claims. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." (citation and internal quotation marks omitted)); *see also Totten v. United States*, 92 U.S. 105, 107 (1875) ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); *Weston v. Lockheed Missiles & Space, Co.*, 881 F.2d 814, 816 (9th Cir. 1989) (recognizing that the state secrets doctrine alone can be the basis for dismissal of an entire case); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (stating that if the state secrets privilege so hampers the defendant in establishing a valid defense that the trier of fact is likely to reach an erroneous conclusion, dismissal is appropriate).

We therefore affirm the district court's grant of summary judgment in favor of Defendants.

APPENDIX C — MOTION TO PUBLISH OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED MAY 24, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sixth Circuit No. 02-2297

DAVID AARON TENENBAUM;
MADELINE GAIL TENENBAUM,

Plaintiffs-Appellants,

-vs-

JOHN SIMONINI, Ltd. Col. ALBERT D. SNYDER; MARK P. YOURCHOCK; ROBERT M. RILEY, Individually and in their Representative Capacities as Employees for the Various Federal Agencies that Employ Them; and the UNITED STATES OF AMERICA

Defendants-Appellees.

MOTION TO PUBLISH OPINION

Defendants-Appellees, through their attorneys, Jeffrey G. Collins, United States Attorney for the Eastern District of Michigan, and Peter A. Caplan and William L. Woodard, Assistant U.S. Attorneys, move this court, pursuant to Sixth Circuit Rule 206, for an order recommending that the panel's May 19, 2004, decision in this case be published. In support of this motion, defendants-appellees state:

Appendix C

1. The panel decision in this case was filed on May 19, 2004, with a notation indicating that it was not recommended for publication.

2. The panel decision addresses, for the first time in this Circuit, the state secrets privilege. While brief, the decision contains the important holding that the state secrets privilege is recognized in this Circuit, that the government's assertion of this privilege is entitled to considerable deference by the court and that a case is properly dismissed where the privilege deprives a defendant of the ability to set forth a valid defense.

3. Inasmuch as this is the first occasion in which a court in this Circuit has addressed the state secrets privilege, lower courts and practitioners would benefit from the publication of this decision.

For these reasons, defendants-appellees believe that the panel decision in this case "establishes a new rule of law" in this Circuit, as contemplated by Sixth Circuit Rule 206(a)(1), and therefore requests that the decision be designated for publication. A copy of the panel decision is attached to this motion.

Appendix C

Respectfully submitted,

JEFFREY G. COLLINS
United States Attorney
s/ Peter A. Caplan
s/ William L. Woodard
PETER A. CAPLAN
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Dated: May 24, 2004

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING MOTION TO PUBLISH COURT'S DECISION FILED JUNE 4, 2004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 02-2297

DAVID AARON TENENBAUM;
MADELINE GAIL TENENBAUM

Plaintiffs - Appellants

v.

JOHN SIMONINI, Lt. Col.; ALBERT D. SNYDER; MARK P. YOURCHOCK; ROBERT M. RILEY, Individually and in their Representative Capacities as Employees for the Various Federal Agencies that Employ Them; and the UNITED STATES OF AMERICA

Defendants - Appellees

ORDER

BEFORE: BATCHELDER, GIBBONS, AND COOK, Circuit Judges.

Upon consideration of the appellee's motion to publish the court's decision in the above cause,

It is **ORDERED** that the motion be and it hereby is **GRANTED.**

Appendix D

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — 5 U.S.C. § 7201(b)

§ 7201. Antidiscrimination policy; minority recruitment program

* * *

(b) It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

* * * *

APPENDIX F — 42 U.S.C. § 2000e-16

§ 2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Appendix F

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[.]

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

APPENDIX G — 42 U.S.C. § 2000e-2(m)

§ 2000e-2. Unlawful employment practices

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * *

APPENDIX H — 5 C.F.R. § 2635.101(13)

Subpart A—General Provisions

§ 2635.101 Basic obligation of public service.

* * *

(13) Employees shall adhere to all law and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

* * * *

APPENDIX I — 5 C.F.R. § 3601.101

PART 3601 — SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF DEFENSE

§ 3601.101 Purpose.

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Defense (DoD) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. DoD employees are required to comply with part 2635, this part, and implementing guidance and procedures.

APPENDIX J — 32 C.F.R. § 40.2

PART 40—STANDARDS OF CONDUCT CROSS-REFERENCES—Table Of Contents

Sec. 40.2 Cross-reference to Standards of Ethical Conduct for Employees of the Exec

DoD employees should refer to the Office of Government Ethics (OGE) regulation, Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, and the Department of Defense (DoD) regulation that supplements the OGE regulation, 5 CFR 3601.101, for standards of conduct provisions, including standards for gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities.

APPENDIX K — DoD 5200.2-R, §§ 2-401(b)-(c)

DEPARTMENT OF DEFENSE

PERSONNEL SECURITY PROGRAM

JANUARY 1987

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE

* * *

Section 4

AUTHORIZED PERSONNEL SECURITY INVESTIGATIVE AGENCIES

* * *

2-401 *Subversive Affiliations*

* * *

b. *Military Department/FBI Jurisdiction.* Allegations of activities covered by criteria a. through f. of paragraph 2-200 of this Regulation are in the exclusive investigative domain of either the counterintelligence agencies of the Military Departments of the FBI, depending on the circumstances of the case and the provisions of the Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI (reference (o)). Whenever allegations of this nature are developed, whether before or after a security clearance has

been issued or during the course of a personnel security investigation conducted by DIS, they shall be referred immediately to either the FBI or to a military department counterintelligence agency, as appropriate.

c. *DIS Jurisdiction.* Allegations of activities limited to those set forth in criterion g. through q. of paragraph 2-200 of this Regulation shall be investigated by DIS.

* * * *

APPENDIX L — AR 60-21, § 1-17

ARMY REGULATION 60-21
AFT 147-15

EXCHANGE SERVICE

PERSONNEL
POLICIES

Headquarters

Department of the Army, and the Air Force
Washington, DC
15 December 1980

UNCLASSIFIED

* * *

1-17. Equal employment opportunity

a. There will be no discrimination in employment. The Federal policy against discrimination on the basis of race, religion, color, national origin, sex, age, marital status, political affiliation, mental or physical handicap is applicable to all applicants for employment, as well as to employees of the AAFES.

b. The Commander, AAFES, is authorized to administer Equal Employment Opportunity programs for civilian applicants and employees of the AAFES.

* * * *

APPENDIX M — AR 380-67, §§ 2-401(b)-(c)

ARMY REGULATION 380-67

SECURITY

PERSONNEL SECURITY PROGRAM

Headquarters
Department of the Army
Washington, DC
9 September 1988

UNCLASSIFIED

* * *

2-401. Subversive affiliations

* * *

b. Military Department/FBI jurisdiction. Allegations of activities covered by criteria *a* through *f* of paragraph 2-200 of this regulation are in the exclusive investigative domain of either the counterintelligence agencies of the Military Departments or the FBI, depending on the circumstances of the case and the provisions of the Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI (reference (o)). Whenever allegations of this nature are developed, whether before or after a security clearance has been issued or during the course of a personnel security investigation conducted

by DIS, they shall be referred immediately to either the FBI or to a Military Department counterintelligence agency, as appropriate.

c. DIS jurisdiction. Allegations of activities limited to those set forth in criterion *g* through *q* of paragraph 2-200 of this regulation shall be investigated by DIS.

* * * *

APPENDIX N — AR 381-20, § 4-5(d)

ARMY REGULATION 381-20

MILITARY INTELLIGENCE

THE ARMY COUNTERINTELLIGENCE PROGRAM

Headquarters
Department of the Army
Washington, DC
15 November 1993

UNCLASSIFIED

* * *

4-5. Shared Investigative responsibility and joint investigations

* * *

d. When Army interests are involved, but subject jurisdiction rests with another agency, Army CI may request a joint investigation. Otherwise, activity will normally consist of liaison with the primary agency, providing assistance as required and authorized, and acquiring copies of reports collectable under AR 381-10. Should agencies with subject jurisdiction request assistance or a joint investigation, Army CI elements will forward the request through the responsible SCO to the ACCO for validation and coordination with

appropriate legal and intelligence oversight personnel. Upon ACCO validation, Army case control procedures will reflect an Army CI investigation.

* * * *

APPENDIX O — EXECUTIVE ORDER 12333, §§ 2.1, 2.2, 2.4. 2.8

Title 3 —

The President

United States Intelligence Activities

Executive Order 12333 of December 4, 1981

46 FR 59941

December 8, 1981

* * *

Conduct of Intelligence Activities

2.1 *Need.* Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decisionmaking in the areas of national defense and foreign relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.

2.2 *Purpose.* This Order is intended to enhance human and technical collection techniques, especially those undertaken abroad, and the acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities and espionage conducted by foreign

powers. Set forth below are certain general principles that, in addition to and consistent with applicable laws, are intended to achieve the proper balance between the acquisition of essential information and protection of individual interests. Nothing in this Order shall be construed to apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department of agency.

* * *

2.4 *Collection Techniques.* Agencies within the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad. Agencies are not authorized to use such techniques as electronic surveillance, unconsented physical search, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the agency concerned and approved by the Attorney General. Such procedures shall protect constitutional and other legal rights and limit use of such information to lawful governmental purpose. These procedures shall not authorize:

(a) The CIA to engage in electronic surveillance within the United States except for the purpose of training, testing, or conducting countermeasures to hostile electronic surveillance;

(b) Unconsented physical searches in the United States by agencies other than the FBI, except for:

Appendix O

(1) Searches by counterintelligence elements of the military services directed against military personnel within the United States or abroad for intelligence purposes, when authorized by a military commander empowered to approve physical searches for law enforcement purposes, based upon a finding of probable cause to believe that such persons are acting as agents of foreign powers; and

(2) Searches by CIA of personal property of non-United States persons lawfully in its possession.

(c) Physical surveillance of a United States person in the United States by agencies other than the FBI, except for:

(1) Physical surveillance of present or former employees, present or former intelligence agency contractors or their present of former employees, or applicants for any such employment or contracting; and

(2) Physical surveillance of a military person employed by a nonintelligence element of a military service.

(d) Physical surveillance of a United States person abroad to collect foreign intelligence, except to obtain significant information that cannot reasonably be acquired by other means.

* * *

2.8 *Consistency With Other Laws.* Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.

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APPENDIX P — EXECUTIVE ORDER 12958, § 1.8(a)

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release — April 17, 1995

EXECUTIVE ORDER 12958

CLASSIFIED NATIONAL SECURITY INFORMATION

* * *

Sec. 1.8. Classification Prohibitions and Limitations.

(a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of national security.

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